STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

ASSOCIATED BUILDERS AND CONTRACTORS, SAGINAW VALLEY AREA CHAPTER,

Plaintiff-Appellant,

v

DIRECTOR OF THE MICHIGAN DEPARTMENT OF CONSUMER & INDUSTRY SERVICES and MIDLAND COUNTY PROSECUTING ATTORNEY,

Defendants-Appellees,

and

MICHIGAN STATE BUILDING & CONSTRUCTION TRADES COUNCIL, et al.

Intervenors/Defendants-Appellees,

and

SAGINAW COUNTY PROSECUTING ATTORNEY,

Intervenor/Appellee. /

Supreme Court No. 124835
Court of Appeals No. 234037

Midland County Circuit Court
Case No. 00-2512-CL

124835

DEFENDANT-APPELLEE, DIRECTOR OF THE MICHIGAN DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES', SUPPLEMENTAL BRIEF

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Dated: October 14, 2004

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Rules

INTRODUCTION

Per the Court's Order of September 17, 2004, Defendant-Appellee (State Defendant), Director of the Michigan Department of Consumer and Industry Services (now Department of Labor & Economic Growth), files this Supplemental Brief in support of its position that Plaintiff-Appellant's (Plaintiff), Associated Builders and Contractors, Saginaw Valley Area Chapter (ABC) Application for Leave to Appeal fails to meet any of the requirements of MCR 7.302(B) and therefore, it should be denied on the ground that there is no "actual controversy" between the parties. State Defendants' earlier brief dated November 10, 2003 did not have the benefit of this Court's recent decision in *National Wildlife Federation v Cleveland Cliffs Iron Company,* 471 Mich 608; 684 NW2d 800 (2004). As discussed below, the *Lujan*[1] test that was adopted by the Court in *Lee v Macomb County Board of Commissioners,* 464 Mich 726, 740; 629 NW2d 900 (2001) and followed in *National Wildlife Federation, supra,* 471 Mich at 628-629, demonstrates that Plaintiff has not yet "suffered, or will imminently suffer, actual harm..." *Id.* at 619, quoting *Lewis v Casey,* 518 US 343, 349-350; 116 S Ct 2174; 135 L Ed 2d 606 (1976). Therefore, the Court lacks subject matter jurisdiction and Plaintiff's Complaint in its entirety involving the administration and application of the Prevailing Wage Act (PWA), 1965 PA 166, MCL 408.551 *et seq,* should be dismissed.

[1] *Lujan v Defenders of Wildlife,* 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992).

ARGUMENT

I. Plaintiff-Appellant does not satisfy the judicial case or controversy requirement as recognized by this Court in *National Wildlife Federation v Cleveland Cliffs Iron Company.*

The requirement of a genuine or legitimate case or controversy or standing as a precondition to bring a lawsuit challenging the constitutionality of a statute was addressed by this Court in *Lee v Macomb County Board of Commissioners, supra* and reaffirmed in *National Wildlife Federation, supra.* The test that a party must meet to establish standing is as follows:

> First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." [*National Wildlife Federation, supra,* 471 Mich at 628-629, quoting *Lee v Macomb County Board of Commissioners, supra,* 464 Mich at 739.]

The rationale for a "particularized" and "imminent" injury is to preclude the court from undertaking a task reserved for the legislative and executive branches of government. In *Lee,* this Court explained that the role and function of the courts is to provide relief to litigants who have suffered or will imminently suffer actual harm. 464 Mich at 739-740. As the Court stated in *National Wildlife Federation v Cleveland Cliffs Iron Company, supra,* 471 Mich at 616, quoting *Massachusetts v Mellon,* 262 US 447, 487-489; 43 S Ct 597; 67 L Ed 2d 1078 (1923):

> The administration of any statute . . . is essentially a matter of public and not of individual concern. . . . <u>The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with the people generally</u>. . . . To [allow standing under a different understanding] would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which we plainly do not possess. [Emphasis added.]

To relax the traditional judicial test for standing, as suggested by Plaintiff, would result in the Court exercising a power which is not within its purview. It would lead to the expansion of judicial power, contrary to the constitutional principles recognized in *National Wildlife Federation.*

Here, the Court of Appeals closely examined Plaintiff's documentary evidence and arguments in support of its claim that standing existed and concluded that an actual controversy did not exist because ABC "did not establish that there was an actual or imminently threatened prosecution of its members." *Associated Builders and Contractors, Saginaw Valley Area Chapter v Kathleen M. Wilbur,* unpublished memorandum opinion, issued August 5, 2003, pp 8-11, 14 (Docket No. 234037). Plaintiff failed to produce evidence of a pending or actual prosecution or any evidence of a contract termination because one of ABC's members violated the PWA. Although the Court below did not specifically apply the *Lujan* test, its legal analysis is sound and it reached the correct result.

The only relevant evidence offered by Plaintiff to the Court in support of its case or controversy argument are contained in the affidavits of Gary Tenaglia and Lee Goulet. (ABC's Brief in Support of Application for Leave to Appeal, Exhibits F & G.) Both admitted that they have complied with all mandates of the Prevailing Wage Act. (Teneglia Affidavit, ¶ 10; Goulet Affidavit, ¶ 8.) Thus, they are in no danger of suffering any "concrete" injury or any "imminent" harm.

With regard to the Tenaglia allegations, the Court of Appeals found that they only alleged hypotheticals. The allegations were summarized in the following manner:

> Plaintiff also submitted below the affidavit of Gary Tenaglia, president of General Electric Contracting, an electrical contractor and member of ABC. Tenaglia averred that the vast majority of his company's work is on state funded construction projects subject to the PWA and that it intends to bid on future

publicly funded construction projects. Tenaglia averred that in order to avoid criminal prosecution and other sanctions under the PWA, his company "has complied with the mandates of the law where applicable," but that notwithstanding these efforts, he had nevertheless been subjected to criminal investigation and threatened with criminal prosecution by the Macomb County Prosecutor. Tenaglia averred that on or about February 1999, the CIS referred twenty-seven PWA complaints against General Electric Contracting to the Macomb County Prosecutor's office, alleging it had failed to pay the prevailing wage rate. The affidavit stated that on October 21, 1999, Tenaglia asked the prosecutor to refer the complaints back to the CIS for re-investigation because the CIS had made several errors, that the prosecutor did so, and that the CIS reinvestigated from October 1999 to March 2000, and then found there was no basis to pursue any of the complaints. As a result of the CIS's re-investigation, Tenaglia was found to have underpaid one claimant by only $10.56, and a second claimant by only $26.40. Tenaglia averred, however, that the Macomb County Prosecutor "continues to fail or refuse to dismiss the criminal investigation" of this firm and him. [Opinion, pp 8-9 (Emphasis added.)]

Thus, the criminal investigation referred to by Mr. Tenaglia has been pending over four years. The Court of Appeals correctly concluded that this affidavit did not show "an actual or threatened prosecution." Opinion, p 10. There is no proof that criminal charges are "actual" or "imminent." *Lujan,* 504 US at 560.

The Court of Appeals also rejected the Goulet averments for the same reasons. The Court reviewed Mr. Goulet's allegations, stating:

Plaintiff also submitted below the affidavit of Lee Goulet, stating that Midland Painting Company, of which Goulet was the owner and president from 1978 until August 200, was awarded a bid on a state construction project, and that after Midland Painting completed the contract in September 1998, it was cited for allegedly violating the PWA by misclassifying workers as "painters" while applying a product called "Dryvit." Goulet averred that pursuant to a FOIA request he made in March 1999, he was provided a copy of the CBA of the Painters Union, Local 1011, and that he had "reason to believe" that the CIS had relied on that CBA, in part, in citing him for violating the PWA. Goulet averred that he learned that a trade jurisdictional dispute existed between the Painters Union, Laborers Union, Carpenters Union and Lathers Union over the application of the product known as Dryvit, and that each of these groups had made claims to such work. Goulet averred that all of the information contained in the instant affidavit was presented to the CIS, and that notwithstanding that a trade jurisdiction dispute existed and that "it was patently uncertain as to the appropriate worker classification to be used to apply Dryvit, the CIS nevertheless

concluded its investigation by advising claimants to pursue their claims criminally through the Mackinac County Prosecutor." [Opinion, p 9 (Emphasis added.)]

There were no criminal charges pursued by the Mackinac County Prosecutor and the Court of Appeals correctly concluded that this affidavit also did not show "an actual or threatened prosecution." Opinion, p 10.

In short, Plaintiff and its members have not demonstrated a "concrete" and "particularized" injury by the application of the PWA. Hypothetical or speculative harm is contrary to constitutionally-based standing requirements under the holdings in *Lee, supra,* and *National Wildlife Federation, supra.*

ABC's pleadings also fail to meet the judicial test for a genuine case or controversy for the same reasons. The contention that the Prevailing Wage Act "fails to give any person of ordinary intelligence, reasonable notice of what actions give rise to a violation of the Act" (Complaint, ¶ 18) and that ABC and its members cannot decipher the definitions of various terms in the PWA (Complaint, ¶ 18E) only shows that Plaintiff is unhappy over the way the Director of Department of Labor & Economic Growth is enforcing or administering the law. Objections alleging bad policy should instead be addressed to the Legislature. *People v Kirby,* 440 Mich 485, 493-494; 487 NW2d 404 (1992). Unless there is "an injury in fact," it is not the role of the courts to oversee disputes involving the enforcement or administration of the state's laws. *National Wildlife Federation,* 471 Mich at 622-623. Authority to resolve these types of disputes is reposed in the other branches of government, not the judicial branch. *Id.*

In sum, Plaintiff has failed to present a real case involving a real dispute that would enable a court to decide a real controversy. ABC, therefore, lacks standing to challenge the constitutionality of the PWA. Plaintiff and its members have not been prosecuted for violating

the PWA nor is a prosecution imminent or pending.[2] ABC continues to be eligible to bid on any prevailing wage project in the state and none of Plaintiff's members have ever had a contract terminated under the Act. See MCL 408.556.

Under the *Lujan* test, Plaintiff fails to meet the first element. There has not been "an invasion of a legally protected interest." ABC has not demonstrated a concrete or particularized injury that is actual or imminent. Allegations of future injuries will not suffice. *Lujan, supra,* 504 US at 565, n 2. Therefore, the Plaintiff has not demonstrated the existence of subject matter jurisdiction because it has failed to satisfy the minimum standards for standing.

[2] At oral argument in the Court of Appeals, counsel for the State Defendant acknowledged that the Department of Attorney General has not brought a prosecution under the Prevailing Wage Act in the last 20 years. On information and belief, the Midland County Prosecutor, where this case was filed, has never brought a prosecution under this Act.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Defendant-Appellee, Director of the Michigan Department of Consumer and Industry Services, respectfully requests this Honorable Court to enter its Order denying the Application for Leave to Appeal.

Respectfully submitted,

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Date: October 14, 2004
cases/00/2000056812C/supplemental brief